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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S REPLY BRIEF

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1. The Dilemma of Self-Incrimination

a. The Threat of Impeachment

Respondent asserts that "the possible subsequent introduction of suppression hearing testimony at the trial on the merits for impeachment purposes does not present a problem of overriding constitutional concern" (Respondent's Brief, p. 17). Emphasizing that "the reasoning employed by this Court in Harris v. New York," 401 U.S. 222 (1971), is "both analogous and appropriate to the resolution" of the impeachment aspect of the self-incrimination dilemma, respondent concludes that "an accused may be impeached by pre-trial statements he made at a suppression hearing" (Respondent's Brief, pp. 17-18). This conclusion is the product of respondent's misanalysis.

Harris allowed the use of previously excluded evidence for impeachment purposes on the basis that an ample deterrent effect on proscribed police conduct was generated by making the unconstitutionally obtained statements of the defendant unavailable to the prosecutor in its case in chief. Harris v. New York, supra at 225.[1] However, in Simmons v. United States, 390 U.S. 377 (1968), this Court "held it unconstitutional for the [prosecution] to use at trial the defendant's testimony given on an unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment." McGautha v. California, 402 U.S. 183, 211 (1971). "[T]o permit such use created an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior." Id.

In situations similar to Harris, the prosecution has available to use against the defendant his pretrial statement made to the police in violation of Miranda v. Arizona, 384 U.S. 436 (1966). If the defendant does not

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[1] Acknowledging that "the impeachment process ... undoubtedly provided valuable aid to the jury is assessing [the defendant's] credibility," this Court in Harris held that "the benefits of this process should not be lost ... because of the speculative possibility that impermissible police conduct will be encouraged thereby." Harris v. New York, supra at 225. "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." Id.

move to exclude the statement on constitutional grounds, the prosecution will use it against him in its case in chief. If he is successful in suppressing the statement, the defendant is then confronted with a decision whether to testify since the excluded pretrial statement is constitutionally admissible as impeachment evidence if it is inconsistent with the accused's trial testimony.

The Harris situation is in marked contrast to the impeachment aspect of the self-incrimination dilemma involved in certain Fourth Amendment claims. To assert his right to challenge the constitutionality of the search and seizure in his case, the defendant must weigh the very real risk that, if his suppression motion fails, his testimony at the suppression hearing may be introduced against him at trial on the theory that it is "inconsistent" with his trial testimony and is thereby admissible as impeachment evidence.

Consequently, the application of the Harris rationale to justify the use of the accused's suppression testimony for impeachment purposes at his trial functions to deter the assertion of Fourth Amendment claims and substantially weakens the efficacy of the exclusionary rule as a disincentive to unlawful searches and seizures.

In urging the demise of the "automatic standing" rule, some critics have suggested that if the use of a defendant's suppression hearing testimony for impeachment purposes at trial unacceptably deters assertion of Fourth Amendment claims then "the appropriate course would be to expand the Simmons use-immunity, not to perpetuate the 'automatic standing' rule" (United States v. Salvucci. No. 79-244, Reply Brief for the United States, p. 3 n.2). Such an alternative proposal only serves to acknowledge the reality of petitioner's position that the various facets of the self-incrimination dilemma have survived the Simmons decision.

c. The Threat of a Prosecutorial "Fishing Expedition"

Dismissing the threat of a prosecutorial "fishing expedition" as a serious aspect of the self-incrimination dilemma, the respondent opines that "[t]he fact that the prosecutor may elicit at the suppression hearing some bit of information from the accused which might further incriminate him on the offenses with which he is charged, or generate other related charges against him, is simply a valid part of the adversarial process in the criminal justice system" (Respondent's Brief, p. 21). This response, endorsing the ploy of prosecutorial "fishing expeditions" as a legitimate technique of the prosecution, constitutes a veritable concession by the respondent as to the reality of this problem and the deterrent effect it generates on the assertion of Fourth Amendment claims.

It has been suggested that the fear of a prosecutorial "fishing expedition" is "completely unrelated to the 'special problem' ... regarding possessory offenses" which generated the "automatic standing" rule since this problem "is equally applicable to all suppression hearings" (United States v. Salvucci, Reply Brief for the United States, p. 4). This contention is shakily constructed on a highly unrealistic premise. Obviously, the prosecution's opportunity for eliciting incriminating information from a defendant who testified at a suppression hearing to establish his right to challenge a particular search and seizure will be greatest in those situations where the defendant is charged with a possessory offense.

When, as in the case sub judice, the defendant to demonstrate his right to contest the search and seizure must acknowledge his ownership of contraband items such as drugs, the prosecutor, in most instances, will have an ideal opportunity to delve into such matters as the source of these drugs, the defendant's purpose in obtaining the drugs, and to whom the defendant had previously given, sold or offered the drugs.

Where the defendant merely testifies at the suppression hearing that he owned the premises searched or a relatively innocuous evidentiary item which was seized, the prosecutor's options for conducting a "fishing expedition" are considerably reduced.

2. The Vice of Prosecutorial Self-contradiction

In a cursory, highly semantical analysis, respondent asserts that since Rakas v. Illinois, 439 U.S. 128 (1978), "the dilemma of prosecutorial self-incrimination no longer exists because now the government can maintain at trial that the accused had lawful 'possession' of the property at the time of the search, yet at the suppression hearing the government can argue that the accused had no legitimate expectation of privacy in either the search or the seizure" (Respondent's Brief, p. 22; emphasis in original).

The respondent's argumentation does little to establish that the "vice of prosecutorial self-contradiction" and its corollary result - "the injustice of an internally inconsistent conviction". - would not continue to occur should the "automatic standing" rule be abolished.

"When the government charges a possessory offense, it is in fact alleging the defendant owns the item, in a broad context of ownership." United States v. Loane, ____ F.Supp. ____ (No. 79-42; E.D. Ky. 1980), opinion rendered January 22, 1980; 26 CrL 2482 (March 5, 1980). "Once the government alleges ownership, the defendant need not take the stand to assert that same ownership." Id., 26 CrL at 2483. "Rather an expectation of privacy is conferred upon the defendant by the nature of the allegations of his ownership of such item." Id., 26 CrL at 2483.

Viewed from this perspective, it is apparent that respondent is in error when he suggests that "the newly evolved 'expectation of privacy' doctrine eliminates the problem of prosecutorial self-contradiction which previously existed under the earlier property standing concepts" (Respondent's Brief, p. 22).

Critics of the "automatic" standing principle contend that Jones v. United States, 362 U.S. 257 (1967), "failed to recognize that the concept of 'possession' can have different meanings in the context of criminal law, where it serves to demarcate antisocial conduct and culpable behavior, and in the context of the Fourth Amendment, where ... it helps to illuminate the existence of a legitimate expectation of privacy" (United States v. Salvucci, No. 79-224, Brief for United States, filed January 28, 1980, pp. 24-25). The fallacy of this contention is amply demonstrated by the substantive criminal law concept of constructive possession.

"[C]onstructive possession means being in a position to exercise dominion or control over a thing." United States v. Holland, 445 F.2d 701, 703 (D.C. Cir. 1971). Under substantive criminal law principles, "[s]uch a position should not be lightly imputed to one found in another's apartment or home." Id. "If an inference of constructive possession must be made, the jury must have before it information about the regularity with which the person in question occupied the place and about his special relationship with the owner or renter." Id. See United States v. Bethea, 442 F.2d 790 (D.C. Cir. 1971).

By judicial definition, constructive possession is "such a 'nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession.'" United States v. Carneglia, 468 F.2d 1084, 1087 (2nd Cir. 1972), citing United States v. Casalinuovo, 350 F.2d 207, 209 (2nd Cir. 1965).

Under the doctrine of constructive possession, "mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession." United States v. DiNovo, 523 F.2d 197, 201 (7th Cir. 1975), citing Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962).

From this perusal of the general precepts governing the application of the principle of constructive possession, it is readily apparent that the requisite ingredients for constructive possession - the accused's "dominion or control over a thing" and a sufficient "nexus or relationship between the defendant and the goods" - are, barring highly unusual circumstances, demonstrative of a possessory interest in the premises searched or the evidence seized, an interest of the defendant which the Fourth Amendment was designed to protect.

Certainly an inherent self-contradiction is generated within the context of a prosecution premised on a theory of the defendant's constructive possession when the government at the suppression hearing vigorously challenges the accused's "dominion and control" over the seized evidence in an effort to defeat his right to contest the validity of the search and seizure, but at trial marshals its evidence in an endeavor to convince the jury that the accused had a sufficient connection with the seized property to have constructively possessed it.

To illustrate the absence of "prosecutorial self-contradiction" in certain prosecutions for possessory offenses, disparagers of the "automatic" standing rule question its use in a prosecution where the defendant "who aids and abets another's unlawful possession is deemed to have committed that possessory offense as a principal" (United States v. Salvucci, Brief for the United States, p. 27).

According to general tenets of substantive criminal law,[2] a person who is prosecuted as a principal on the theory of aiding and abetting the unlawful possession of a contraband drug would not necessarily be charged with an offense that includes, as an essential element of the

[2]"In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" Nye & Nissen v. United States, 330 U.S. 613, 619 (1949), citing United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938).

offense charged, his possession of the seized evidence at the time of the contested search and seizure. Brown v. United States, 411 U.S. 223, 229 (1973). Under the normal circumstances of an aider and abettor theory of prosecution in a possessory offense case, the alleged aider and abettor would not be entitled to "automatic standing."

It must be remembered that the "automatic standing" rule is not applicable to a situation where "the Government's case against [the defendant] does not depend on [the defendant's] possession of the seized evidence at the time of the contested search and seizure." Brown v. United States, 411 U.S. 223, 228 (1973). This, of course, would be the normal situation in the aiding and abetting example posed by the critics of "automatic standing."

Obviously then, little weight can be given to the criticism that the "automatic standing" rule creates unacceptable results when it is applied to a person prosecuted as an aider and abettor to a possessory offense since by this Court's prior decisions such an extension or application of the doctrine of "automatic standing" is clearly erroneous.

In the final analysis, "the rationale for automatic standing is still as valid as it was at the time of Jones." United States v. Loane, supra, 26 CrL at 2483. "The objection that the sovereign, whose obligation is to assure justice for all, should not be heard to take inconsistent positions at a suppression hearing and trial is still as valid as it ever was." Id.

A "primary justification for the automatic standing rule is the repugnance of a representative of the sovereign coming before the court at succeeding stages of the proceeding with arguments against a defendant that are not only inconsistent but self-contradictory." Id.

C. PETITIONER WAS ENTITLED TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE THAT SEARCH VIOLATED HIS REASONABLE EXPECTATION OF PRIVACY.

In an effort to support his contentions that "petitioner had no actual (subjective) expectation of privacy in Mrs. Cox's purse" and that petitioner's "alleged expectation of privacy is clearly unreasonable under given societal norms," respondent argues that, although "petitioner asked Mrs. Cox to keep the drugs in her purse," he "placed them there before she could respond" (Respondent's Brief, p. 26, citing T.E., p. 13). Respondent further interpolates the evidence to show that "Mrs. Cox did not want the drugs in her purse and did not give her permission to petitioner to place them there" (Respondent's Brief, p. 26).

Petitioner disagrees with this analysis of the evidence. Petitioner testified at the pretrial suppression hearing that Ms. Cox gave him express permission to place some items in her purse (T.S.H. (II), p. 4; App., p. 42).[3] Additionally, Ms. Cox's trial testimony does not indicate that petitioner placed any items in her purse before she could respond to his request for permission or that at the time the items were actually placed in her purse she indicated she did not want them placed there.[4] To the contrary, Ms. Cox's testimony establishes it was only when she subsequently glanced in her purse that she became concerned about having petitioner's property in her purse (T.E., p. 13).

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[3]At the December 1, 1976 pretrial suppression hearing, petitioner testified that as he and Vanessa Cox "were getting ready" to leave the Marquess residence "to go pick up [her] car" petitioner "asked her if she would carry this [the drugs and address book] for [him] and she said, 'yes'" T.S.H. (II), p. 4; App., p. 42). Petitioner explained that these items "were placed into her purse and then right at that time some people came in the back door," petitioner "went to the restroom," and "the knock [by the police] came on the front door" (T.S.H. (II), p. 4; App., pp. 42-43). According to petitioner's pretrial testimony, he placed the items in Ms. Cox's purse "approximately three, four minutes before" the police arrived at the Marquess residence (T.S.H. (II), p. 20; App., p. 51).

[4]At the trial Vanessa Cox testified that as she, petitioner and Dennis Saddler "were getting ready to leave" the Marquess residence "to go get [her] car," petitioner

It is true that Ms. Cox testified that she had asked petitioner, prior to the arrival of the police, to remove some or all of his property (the drugs and/or the address book) from her purse and that he had agreed to do so. However, this factor has little significance or relevance to petitioner's reasonable expectation of privacy in Ms. Cox's purse in view of other circumstances in the instant case.

For example, Ms. Cox's decision to allow petitioner's property to remain in her purse during forty-five minutes of police detention when she knew petitioner's property included a large amount of contraband drugs underscores Ms. Cox's implicit acquiescence in petitioner's use of her purse as a repository of his personal effects. Obviously, had Vanessa Cox of her own accord, rather than police compulsion, opened her purse, removed petitioner's property, and returned those items to him, then this would have served as a cancellation or recission of petitioner's privacy rights in Ms. Cox's purse. However, petitioner's expectation of privacy in Ms. Cox's purse was not terminated by her free and voluntary action, but as a result of an unconstitutional governmental intrusion into a constitutionally protected area. "It is, of course, irrelevant that [Vanessa Cox] might validly have consented to a search of [her purse] where the [drugs and address book] were kept, for it is not claimed that any such

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"brought out a [dark] green [bank deposit] bag and said, 'would you please carry this for me. I don't want to carry this bag around'" (T.E., pp. 12, 35). At that point petitioner "kind of dumped ... the contents of the bank bag into [her] purse" (T.E., p. 13).

Ms. Cox did not know what was in the bank deposit bag (T.E., p. 13). It was only when she "glanced in [her] purse" that she "saw the one large vial which had several something in it and ... an address book" (T.E., p. 13). At that point in time Ms. Cox asked petitioner, "would you please take care of this, I do not want this in my purse. Would you mind taking it out?" (T.E., pp. 13-14, 24, 35). According to Ms. Cox, petitioner replied, "okay, just a minute, I will" (T.E., pp. 14, 15, 24). Petitioner then "went around the corner" towards the bathroom (T.E., p. 14). Ms. Cox added that "before [petitioner] had an opportunity to take it [the address book] out [of her purse] the policemen arrived" (T.E., pp. 14, 35).

consent was given, either expressly or by implication." Mancusi v. De Forte, 392 U.S. 364, 369-370 (1968).

Respondent contends that "petitioner cannot derivatively invoke any expectation of privacy that Mrs. Cox had in her purse" because "Fourth Amendment rights are personal in nature and cannot be vicariously asserted by third parties" (Respondent's Brief, p. 29). Such a simplistic analysis overlooks the realities of interpersonal relationships in society and the expectations of privacy generated by the joint use of either repositories for personal effects or premises.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 7 (1977). In the case at bar, "important Fourth Amendment privacy interests were at stake." Id. at 11.

"By placing personal effects inside" Vanessa Cox's purse with her knowledge and apparent consent, petitioner "manifested an expectation that the contents would remain free from public examination." United States v. Chadwick, supra at 11. "No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment." Id.

The "contents" of a purse "are not open to public view"; a purse "is intended as a repository of personal effects." United States v. Chadwick, supra at 13. "In sum, a person's expectations of privacy in [a purse or] personal luggage" is substantial and legitimate.[5] Id.

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[5]According to one social commentator, the concept of "possessional territory" means "[a]ny set of objects that can be identified with the self and arrayed around the body wherever it is"; "central examples [of possessional territory] are spoken of as 'personal effects' - easily detachable possessions such as jackets, hats, gloves, cigarette packs, matches, handbags and what they contain, and parcels." E. Goffman, Relations in Public 38 (1971). Similarly, an "information preserve" is "[t]he set of facts about himself to which an individual expects to control access while in the presence of others"; one variety of information preserve includes "the contents of pockets, purses, containers, letters, and the like, which the claimant can feel others have no right to ascertain." Id. at 38-39.

Petitioner's "principal privacy interest in [Vanessa Cox's purse] was, of course, not in the container itself, which was exposed to public view, but in its contents." United States v. Chadwick, supra at 13 n.8.[6]

"[L]uggage," whether "a locked, 200-pound footlocker" or a "comparatively small unlocked suitcase," is "a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." Arkansas v. Sanders, ____ U.S. ____, 99 S.Ct. 2586, 2592 (1979).

Even a person's "failure to lock" her purse or her inability to do so does not "alter its fundamental character as a repository for personal, private effects." Id., 99 S.Ct. at 2592 n.9. "Indeed, the very purpose of a suitcase" or a purse "is to serve as a repository for personal items when one wishes to transport them." Arkansas v. Sanders, supra, 99 S.Ct. at 2593.

Clearly petitioner "would have been entitled to expect" that the contents of his own briefcase or purse "would not be taken except with his permission." Mancusi v. De Forte, 392 U.S. 364, 369 (1968). "[T]he situation was not fundamentally changed because [petitioner] shared" the purse with its owner, Ms. Cox. Id. at 369. Petitioner still could reasonably have expected that the contents of Ms. Cox's purse "would not be touched except with [the] permission" of Ms. Cox. Id.

To ascertain whether society is prepared to recognize as reasonable an expectation of privacy generated by the shared use of a purse or briefcase, certain realities of personal and public relations should be considered.

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[6]Of course, "[n]ot all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment." Arkansas v. Sanders, ____ U.S. ____, 99 S.Ct. 2586, 2593 n.13 (1979). "Thus, some containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Id., 99 S.Ct. at 2593 n.13.

"[I]t is the case that two or more individuals may together possess the same territory, jointly laying claim to it in the name of their collectivity." E. Goffman, Relations in Public 57 (1971). "Thus when an individual claims a table by sitting at it, he can indeed be claiming the table for his party, a social unit in which he is merely one participant." Id. "Every social relationship, both anonymous and personal, implies some joint tenure, and some relationships (such as marital ones) imply a great deal." Id.

"[A]n act which may intrude or expose when performed by one individual to another can be perfectly appropriate when performed by the same individual to someone else, someone with whom he shares the relevant territory." Id. "Thus a policeman who feels it necessary to ask a prostitute in the station to empty her own purse so he can inspect its contents is likely to feel free to dig into his wife's purse for change or cigarettes." Id.

When petitioner entrusted items to Ms. Cox for storage and even transportation in her purse, he took normal precautions to maintain his privacy. The shared use of a traditional repository of personal effects, such as a purse, briefcase, or luggage, generates an expectation of privacy in the nonowner of the shared repository that society is prepared to recognize as reasonable. To hold otherwise would rend the principles of law from the realities of daily life.

In the final analysis petitioner was constitutionally entitled to contest the legality of the search of Ms. Cox's purse on three distinct, but "invariably intertwined concepts" - the "automatic" standing rule, standing generated by an actual possessory or ownership interest in the property seized, and a "reasonable and legitimate expectation of privacy." All three of these methodologies function to demonstrate that the police search of Ms. Cox's purse and

the seizure of petitioner's personal property "infringed an interest of [the petitioner] which the Fourth Amendment was designed to protect." Rakas v. Illinois, 439 U.S. 128, 140 (1978).

II.

THE SEARCHES AND SEIZURES WHICH PRODUCED THE CONTRABAND DRUGS AND OTHER INCRIMINATING EVIDENCE WERE THE FRUITS OF THE UNCONSTITUTIONAL ARRESTS OF BOTH PETITIONER AND VANESSA COX IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

Respondent initially argues that the "temporary detention while a warrant was sought is not an intrusion of the types condemned" in Dunaway v. New York, ____ U.S. ____, 98 S.Ct. 2248 (1979), Davis v. Mississippi, 394 U.S. 721 (1969), Brown v. Illinois, 422 U.S. 590 (1975), and Ybarra v. Illinois, ____ U.S. ____, 100 S.Ct. 338 (1979), rather "the restraint in the case before the bar is nearer to the type of intrusion permitted in Terry v. Ohio, 392 U.S. 1 (1968), but is still different" (Respondent's Brief, p. 31).

Even assuming arguendo that the detention of Ms. Cox and petitioner was a seizure less intrusive than a traditional arrest, that detention constituted a violation of the Fourth Amendment.

"The reasonableness of seizures that are less intrusive than a traditional arrest," ultimately, "depends '"on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."'" Brown v. Texas, ____ U.S. ____, 99 S.Ct. 2637, 2640 (1979), citing Pennsylvania v. Mims, 434 U.S. 106, 109 (1977), and United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

"Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Brown v. Texas, supra, 99 S.Ct. at 2640. "A central concern in balancing

these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Id., 99 S.Ct. at 2640, citing, inter alia, Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1396-97 (1979).

To accomplish this goal, "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown v. Texas, supra, 99 S.Ct. at 2640.

Apparently respondent is attempting to justify the police detention of Ms. Cox, petitioner, and the three other people at the residence on the basis that the police were in the process of seeking a warrant which would permit a search of these five individuals (Respondent's Brief, pp. 30-31).

As previously explained in petitioner's initial brief, the warrantless arrest/detention of petitioner and the other people present at the Marquess residence was unconstitutional because it was not supported by probable cause to arrest" (Petitioner's Brief, pp. 67-71). That same analysis establishes that the police in the instant case also lacked "a reasonable suspicion, based on objective facts, that the individual," either Ms. Cox or petitioner, was "involved in criminal activity," or "had engaged in criminal conduct." Brown v. Texas, supra, 99 S.Ct. at 2641.

"In the absence of any basis for suspecting [petitioner or Ms. Cox] of misconduct, the balance between the public interest and [the] right [of petitioner and Ms. Cox] to personal security and privacy tilts in favor of freedom from police interference." Brown v. Texas, ____ U.S. ____, 99 S.Ct. at 2641.

Respondent, citing United States v. Van Leeuwen, 397 U.S. 249 (1970), notes that "the detention of a piece of mail for a period of 29 hours in order to obtain a warrant was acceptable under the facts" and reasons that "the detention" at bar of "20-45 minutes, which while it was of people, was nevertheless on balance reasonable" (Respondent's Brief, pp. 31-32).

Respondent's attempt to equate the detention of mail with the detention/arrest of people reveals a callous view of the function of the Fourth Amendment. As this Court observed in Van Leeuwen, "the only thing done here on the basis of suspicion was detention of the packages" which "at that point [created] no possible invasion of the right 'to be secure' in the 'persons, houses, papers and effects' protected by the Fourth Amendment against 'unreasonable searches and seizures.'" United States v. Van Leeuwen, supra at 1032. "No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited." Id. In Van Leeuwen "[t]he significant Fourth Amendment interest was in the privacy of [the] first-class mail" and "that privacy was not disturbed or invaded until the approval of the magistrate was approved." Id.

Because the Fourth Amendment, of course, applies to all seizures of the person, including seizures that involve only a brief detention short of a traditional arrest, the forty-five minute detention/arrest of petitioner and Ms. Cox cannot be dismissed on the basis of constitutional principles enunciated in the context of assessing the reasonableness of a 29-hour detention of mail.

Respondent's plea that "[p]rohibiting police officers from detaining [people] for a reasonable time period in order to obtain a judicially granted search results in an unreasonable dilemma for the police" is entitled to little persuasive value (Respondent's Brief, p. 32).

It is axiomatic that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Mincey v. Arizona, ____ U.S. ____, 98 S.Ct. 2408, 2414 (1978). Of course, the imminent destruction of evidence could constitute such an exigent situation. Schmerber v. California, 384 U.S. 757, 770-771 (1966). These principles of constitutional law render the police dilemma posited by respondent emminently resolvable without compromising essential Fourth Amendment rights.

As the dissenting justice in the Kentucky Supreme Court explained, "[a]ll evidence discovered [in the case at bar] was a result of this unlawful detention and should be suppressed as 'fruit of the poisonous tree.'" Rawlings v. Commonwealth, Ky., 581 S.W.2d 348, 351 (1979) (Lukowsky, J., dissenting).

CONCLUSION

For the foregoing reasons as well as those delineated in petitioner's initial brief, the judgment of the Supreme Court of Kentucky affirming petitioner's conviction should be reversed.

Respectfully Submitted,

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